



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 8, 1998

Mr. Mario Aguilar
Senior Attorney
Texas Department of Housing
and Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941

OR98-0085

Dear Mr. Aguilar:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 35148.

The Texas Department of Housing and Community Affairs (the "department") received a request for copies of accepted bid proposals by underwriters of single family mortgage revenue bonds, as well as the department's selection criteria. You state that the department will release the requested information except for the proposal submitted by Goldman, Sachs & Co. ("Goldman"). You ask whether the information concerning Goldman is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

This office notified Goldman of this request and of its opportunity to claim that the information at issue is excepted from public disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Goldman responded to our notice, claiming that its proposal should be excepted from disclosure by sections 552.104 and 552.110 of the Government Code.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give an advantage to a competitor or bidder." The purpose of this

exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. As section 552.104 was developed to protect a governmental body's interests, that body may waive this exception. *See* Open Records Decision No. 592 (1991) at 8. Furthermore, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. *E.g.*, Open Records Decision Nos. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. We understand that the contract at issue has already been awarded. Therefore, the department may not withhold the requested information under section 552.104.

We now address Goldman's argument that the information at issue is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property and privacy interests of third parties by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Goldman does not assert that the information submitted for our review consists of confidential commercial or financial information. Accordingly, we need address only the trade secret branch of section 552.110.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is


any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret

as well as the Restatement's list of six trade secret factors. *Id.*¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. Having reviewed the information submitted to this office, we find that Goldman's arguments against disclosure are merely conclusory and do not demonstrate, by a prima facie case, that its proposal contains trade secrets. Thus, we conclude that the information at issue may not be withheld under section 552.110, and must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,


Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/gle

Ref.: ID# 35148

Enclosures: Submitted documents

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

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